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IN THE

Supreme Court of the United States

OCTOBER, 1946, TERM.

No. [redacted] 152

ROBERT W. BARNES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Cases Cited.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement.

The petitioner seeks a review of the judgment of the Supreme Court of Niagara County convicting him of the crime of Murder in the First Degree and sentencing him to imprisonment at Attica State Prison for the term of his natural life. Following affirmance of the judgment of conviction by the Appellate Division of the Supreme Court, on appeal to the Court of Appeals, the judgment of conviction was affirmed with one judge dissenting.

The remittitur of the Court of Appeals did not state that the petitioner herein raised a Federal Question, that his rights under the Due Process of Law clause of the 14th Amendment had not been violated and that such question

had been necessarily passed on by the court and the petitioner made a motion in the Court of Appeals returnable May 20, 1946 to amend its remittitur to show that the petitioner had raised said Federal Question. Said motion was decided by the Court of Appeals on June 13, 1946 and the motion was denied on the ground that under the rules of practice the constitutional question involved in the admission of the defendant's confession was not subject to review in the absence of an exception and no exception had been taken to the admission of the confession.

The petitioner contends that the admission in evidence of certain oral and written admissions and confessions of the petitioner was a denial of due process of law under the 14th Amendment.

Outline of Evidence Material to the Questions Presented.

On the morning of August 4, 1944, Alvie J. Kennedy returning from work to his home at 625 Dorothy Street, in the City of Niagara Falls at about 5:45 A. M. (R. 56) found his wife, Miriam Kennedy, lying on the bedroom floor dead, her legs spread apart, her night clothing disarranged and around the upper part of her body, her underpanties around her neck and bruise marks around her throat and neck. An autopsy performed by a pathologist revealed numerous cuts and lacerations about the throat and neck and the finding as to the cause of death was asphyxiation by strangulation (R. 48-49). Spermatozoa were found in the vagina which the pathologist testified could not have been present for more than a few days and in any event less than a week (R. 49). On the trial Mr. Kennedy, the victim's husband, testified that he had last had intercourse with the victim about two weeks before the murder and at that time he used a rubber contraceptive (R. 78).

A pair of men's pants was found near the victim's body which the victim's husband had never seen before (R. 66, 67-93). The window in the bedroom adjoining the victim's, occupied by the Kennedy's son James, age 8, was open and the screen was on the ground, the eyelets holding the screen to the window having been pulled out (R. 71-74, 94).

About a half hour prior to the assault on Mrs. Kennedy, entries by wrenching screens from windows had been made in four or five other homes in the immediate area of the victim's home and a radio had been stolen from the Ashworth apartment next door to the Kennedy's.

James Kennedy, the eight year old son of the victim, identified the petitioner as a man who had come into his room just after he had been awakened by having heard a commotion in his mother's room and who just started to choke him when he heard his father, Mr. Kennedy, returning home at the front door and calling to his mother to come to the front door. James testified that when his father called out upon reaching home the man jumped out his window (R. 139-141, 142, 143).

The morning of the murder a palm print was found on the sill of the window in James Kennedy's bedroom from which the screen had been wrenched and through which James said the intruder in the apartment had escaped (R. 145, 151, 182-184). Subsequently ninety or ninety-five palm prints of persons living in the immediate vicinity of the Kennedy home were taken and included in the group were those of the defendant Barnes, (R. 184-187). Paul D. McCann, Director of the New York State Division of Criminal Identification, testified on the trial that it was his opinion, based upon twenty-two points of similarity of characteristic

pattern that the latent print and the print of the defendant's right palm were made by the same hand (R. 213-229).

Following comparison of the latent print and the print of the petitioner, the petitioner Barnes, a thirty-four year old negro residing a few blocks from the victim's home, was taken into custody August 17th. Captain Robert Fitzsimmons, head of the Detective Bureau of the Niagara Falls Police and Sergeant Harold DeBrine of the Bureau of Criminal Investigation, New York State Police, the two officers in charge of the investigation, testified to all the various conversations and interviews had with the defendant following his being taken into custody by the police and fingerprinted about five P. M. on the afternoon of August 17th and established the voluntary character of the admissions and two written confessions. His first oral admission to Captain Fitzsimmons and Sergeant DeBrine was made on the afternoon of the day following his being taken into custody. He said he got home at fourteen minutes to five the morning of the murder and ten minutes later, after his wife was asleep, got dressed and left the house. He told of going to the victim's home, properly describing its location, entering through the rear door, going through the apartment into the victim's room, or as he described it, the room closest to Niagara Falls, and stepping into her room as she raised up in bed and screamed. He said he struggled with her and knocked her to the floor stunning her. He then told of having intercourse with her and as she started to move round he said he choked her until she didn't move any more. He said he then went into another bedroom and saw a small boy standing in bed. The boy said something about telling his daddy and the defendant just shoved the boy down on the bed when he heard a noise at the front door and vaulted out the boy's window. The narrative of the conversations

between the police officers and the defendant and the events preceding the defendant's admissions, are found at (R. 265-274, 338-342). That same evening after dinner the defendant was questioned by the District Attorney and his statement, very similar to the oral admissions previously made to the police officers was taken down on a typewriter and signed by him (Exhibit 46). Offered in evidence (R. 297). Read in evidence (R. 307-311). The following morning, August 19th, he gave the police the same account of time and events in connection with his arrivals and departures from home and his going to Kennedy's and also told of attempts to enter other homes in the area immediately prior to his entry into the Kennedy home and of taking the radio from the Ashworth home, adjoining Kennedy's, which he dropped in his flight and was later recovered by the police (R. 281-287, 344, 345). His oral statement on the morning of August 19th was taken down on the typewriter and was signed by him that afternoon (Exhibit 47). (Offered in evidence R. 297, read in evidence R. 312-316). On the following day, August 20th, just prior to his arraignment before Police Justice Francis L. Giles, the defendant was taken to the scene of the crime and there reenacted it as he had previously described it in the presence of the police officials (R. 293-296, 345). On the trial the defendant, testifying in his own behalf, repudiated the confessions and charged all persons engaged in the investigation with acts of excessive brutality, drugging, fraud and sexual depravity. Captain Fitzsimmons, Sergeant De Brine and Dr. Daniel F. Patchin were called as rebuttal witnesses for the people and denied the charges of the defendant.

Jurisdiction.

The jurisdiction of this court is invoked by petitioner under Sec. 237 (b) of the Judicial Code as Amended, 28 U. S. C. A. Sec. 344 (b).

It is the contention of the respondent that jurisdiction is totally lacking; that the order of the Court of Appeals affirming the judgment of the Supreme Court, did not decide the Federal Question of whether the petitioner's rights under the due process of law clause of the 14th amendment had been violated, for the reason that, as stated in the Memorandum of the Court of Appeals handed down in connection with its denial of petitioner's motion to amend the remittitur to show that a federal question had been passed on, "The question was not subject to review in the absence of an exception and no exception had been taken to the admission of the confession". The court requested by petitioner's counsel on motion to state that it had reviewed a Constitutional Question and had decided that the petitioner's rights had not been violated, specifically stated in its Memorandum that for the reasons above it did not consider the Constitutional Question involved in the admission of the defendant's confession. Respondent further submits that Barnes' admissions and confessions were lawfully received in evidence and that the question of whether they were or were not lawfully obtained was submitted to the jury under proper instructions of the trial court and that therefore there was no denial of due process.

ARGUMENT.

Point I.

The federal question presented by petitioner on this application not having been properly presented to the New York Court of Appeals and not having been decided by that court it is not properly subject to review by this court. To give the court jurisdiction it must appear affirmatively not only that the federal question was presented for decision

but that it was actually decided by the highest court of the state.

As stated in Hartford Life Insurance Co. vs. Johnson, 249 U. S. 490, "The jurisdiction of this court to review the final judgment or decree of the highest court of a state, in such a case as we have here, is defined in Sec. 237 of the Judicial Code as amended September 6, 1916, c. 448, 39 Stat. 726 which provides that it shall be competent for the court by certiorari to require any such cause to be certified to it for review when there is claimed in it any title, right, privilege or immunity under the Constitution of the United States and 'the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed by either party under such Constitution'. It is the settled law that this provision means 'that the claim must be asserted at the proper time and in the proper manner by pleadings, motion or other appropriate action under the state system of pleading and practice * * * and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this court, where it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defaulting the claim of federal right' ".

Citing Atlantic Coast Line R. Co. versus Mims, 242 U. S. 532, 535, Gaquet versus LaPeyre, 242 U. S. 367.

Following the judgment of the Court of Appeals of the State of New York affirming the coviction of petitioner rendered March 7, 1946, petitioner made a motion in the Court of Appeals to amend its remittitur to show that petitioner raised a federal question as requested in his brief and argument. The Court of Appeals on June 13, 1946 denied the motion and filed the following memorandum:

The People of the State of New York, Respondent
versus
Robert W. Barnes, Appellant
Decided June 13, 1946
Motion to Amend Remittitur
Per Curiam

We do not consider the constitutional question involved in the admission of the defendant's confession, because under our rules of practice the question was not subject to review in the absence of an exception, and no exception had been taken to the admission of the confession.

(Pontius versus People of the State of New York, 82 N. Y. 339, 346-347; People vs. Cummins, 209 N. Y. 283; People vs. Pindar, 210 N. Y. 191.)

The statute removing the necessity for an exception in such a case does not become effective until September 1, 1946 (Laws of 1946, Chap. 209).

The motion should be denied.

Loughran, Chief Judge, Lewis, Conway, Thacher and Fuld, J. J., concur; Desmond, J., votes to grant the motion; Dye, J., taking no part.

Motion denied.

The memorandum of the court quoted above in the instant case reiterates the well established law of the state as held in the cases cited, that the Court of Appeals will consider in other than capital cases only questions of law raised by exceptions taken on the trial and where no exceptions are taken in connection with rulings on the admissibility of evidence, the remedy of the party is to ask for instructions to the jury to disregard such evidence. In the case at bar no exceptions were taken to the court's ruling on the admissibility of the admissions and confessions and no exceptions were taken to the charge with ref-

erence to their being received in evidence and considerd by the jury. In that situation the Federal Question urged by petitioner's counsel could not be and was not properly presented to or passed upon by the Court of Appeals and this court is without jurisdiction to review the judgment sought to be reviewed herein.

Point II.

There were no violations of petitioner's constitutional rights upon the trial, the defendant's statements and confessions were properly received in evidence by the court to whose ruling on their admission no exceptions were taken by petitioner's counsel, the court properly instructed the jury as to the law applicable to their consideration of them, and the evidence entirely justified a finding by the jury that they were given voluntarily and without coercion.

Captain Fitzsimmons and Sergeant DeBrine testified to the oral admissions made to them by the petitioner while in custody in which he narrated in complete detail his participation in the crime, and the officials also testified to the written confessions (Exs. 46, 47) received on the trial. Fitzsimmons and DeBrine, who were in charge of the investigation and who were present at all times when the petitioner was questioned after being taken into custody, narrated in detail all the circumstances preceding and attending the taking of the statements.

Petitioner was taken into custody by the police and fingerprinted about 5:00 P. M., on the afternoon of August 17. He was questioned shortly after being taken into custody for about three-quarters of an hour concerning his movements on the night previous to and the morning of the murder, without mention being made of the murder, and claimed to have been out most of the night before and at home from

4:45 A. M., on (R. 239-245, 333). Later the same evening, from about 8:00 P. M., to 11:00 P. M., the petitioner was again questioned and, for the first time, specifically about the murder, and he reiterated his previous statement as to his movements and denied any knowledge of the murder, or even having heard about it until the 6th day of August, the day after its occurrence. He claimed that he didn't wear Cooper Jockey shorts and that his size was 34 (R. 245-249, 333). The following morning about 9:30 he was questioned by the District Attorney for about one and one-half (1½) hours, and continued to deny his guilt (R. 249, 250, 333).

That afternoon he was taken to Buffalo Police Headquarters where he was put on the lie detector and questioned by the operator, a Buffalo police officer. During the time that he was in the room in which the lie detector test was given, and while he was alone and he thought unobserved, he attempted to damage the apparatus by biting a tube. Upon being confronted with the charge that he had damaged the machine, he rushed the police officer that had accused him, and an officer, coming to the first officer's aid, struck the petitioner (R. 251-262, 334-337). Before being taken back to Niagara Falls, he was questioned further concerning the crime, confronted with the identical similarity in size and style of his own shorts and the shorts found at the scene of the crime, and he continued to deny any knowledge of it (R. 262-265, 337, 338).

On the way back to Niagara Falls the petitioner was questioned further by Fitzsimmons and DeBrine, but continued to deny any guilt until they had reached the City and had crossed the Grand Island Bridge. Just previously, Captain Fitzsimmons had pointed out a place where a murder victim had been thrown from the bridge, and said that the murderer, who had lied, was awaiting execution for the mur-

der (R. 265-268, 338, 339). The petitioner shortly thereafter asked about the sentence he would get, and when told it would be up to a Judge and Jury said if they would take him to see his wife he would tell about the Kennedy murder, because he killed Mrs. Kennedy (R. 266-268, 339). They drove to the petitioner's home and his wife wasn't there, but on the way back to headquarters the petitioner narrated orally the details of the crime. The petitioner, after being at headquarters for about twenty minutes, was taken to No. 2 Station where he was examined by a doctor and then after being taken to supper in a public restaurant was questioned by the District Attorney in the presence of the police officers and Dr. Patchin, who had examined the petitioner, and his statement was then taken down on a typewriter and signed by the petitioner after having read it over aloud. The circumstances surrounding the taking of the statement (Ex. 46) were testified to by Captain Fitzsimmons (R. 275-280), Sergeant DeBrine (R. 343-345), and Dr. Daniel F. Patchin (R. 356-361).

The following morning he was further questioned and a typewritten statement taken and he, for the first time, admitted the shorts at the scene were his (R. 281, 345).

He also gave a detailed account of his attempts to enter two other homes in the neighborhood on the same morning; and of his entry into the Raybon home and the Ashworth home where he stole the radio. The petitioner was questioned at considerable length concerning a murder of similar character to the Kennedy murder which had occurred at the Pineacres Project several months before the Kennedy murder, as appears in the testimony of the defendant given on the trial, but he steadfastly denied any responsibility therefor.

The following day, August 20th, he was taken to the scene of the crime where he reenacted it as he had previously de-

scribed it, and was then arraigned before Police Justice Giles (R. 293-297, 345, 346).

The court before allowing the testimony of the oral admissions, permitted petitioner's counsel an opportunity to cross-examine the witness, which counsel rejected (R. 266, 267). Petitioner's counsel's objection to the receipt of the admissions was overruled with no exceptions taken, and then before allowing the witness to proceed, the court admonished the Jury as follows:

> "Perhaps I ought to say to the Jury that in admitting this evidence, the court does not indicate that the court takes cognizance of it or believes it. I believe that it is proper evidence to be presented to you to be determined by you as to its character and truthfulness."
>
> Mr. Newton: "And whether it is voluntary."
>
> The Court: "Oh yes." (R. 267).

Following the offering in evidence of the two confessions (Exs. 46, 47), and the preliminary cross-examination by petitioner's counsel (R. 297-304), the court received the Exhibits in evidence, overruling petitioner's objection to which ruling no exception was taken (R. 304, 305) and properly advised the Jury as to the significance to be given their introduction, as follows:

> "I over-rule the objection and say to the Jury, as I said before, so far as the admissions and confessions are concerned, when the court allows them in evidence, it does not signify that the court believes that they are voluntary confessions because those things are questions for the Jury to determine. In the event that these confessions or admissions are not voluntarily and freely given, then they must be disregarded by the Jury. The fact that they are introduced in evidence is simply so that they may be presented to you to determine that question." (R. 304, 305).

THE PETITIONER'S TESTIMONY.

The petitioner testifying in his own behalf, told a story in narrative form, in which he charged those engaged in the investigation with excessive brutality, repeated threats, frauds, the use of vile language, various acts of sexual depravity, and the use of drugs to overcome his normal mental processes. He claims that after being questioned at headquarters when he was first picked up, the District Attorney said,

> "Don't worry with this black bastard. Take him down to No. 2." (R. 433, 434).

While at No. 2 Sergeant DeBrine attempted to slap him (R. 436); the next afternoon at Buffalo Police Headquarters, while on the lie detector, he claimed he was knocked down, kicked and stomped on after an argument over whether the shorts found at the scene of the crime were his, in the course of which two officers called him "a lying black son of a bitch" (R. 448, 449). Following this, they (the Buffalo police officers, Fitzsimmons and DeBrine) removed all the clothes he had on (R. 450), took his private and squeezed it (R. 450, 451). They had already taken his shorts in Niagara Falls (R. 451). A man, claiming the District Attorney was his boss, said he could make it easy for him if he confessed (R. 452), and failing to get a confession on that basis, said, "Take him out to his wife's house and let him have intercourse with his wife. His balls is hot. Maybe he will talk then" (R. 452). He "wouldn't let the officers go out and watch him do something like that" (R. 453). He still denied his guilt and any knowledge of the crime so they started back to Niagara Falls. At the top of the Grand Island Bridge Captain Fitzsimmons and Sergeant DeBrine parked the car and DeBrine pointed out a spot on the bridge where a man got thrown off for lying. They told him a

man was thrown off the bridge for lying and if he didn't tell the truth they would bring him back there (R. 455). In the next breath he said they told him the man that threw him in the river was awaiting his execution (R. 455). DeBrine told him if he told the truth they would make it light on him. Fitzsimmons said they would see about getting a light sentence (R. 455). He didn't want to go out to his house to see his wife but the officers insisted on taking him. His wife wasn't there and she wasn't at The Carborundum working. Finally at The Shredded Wheat plant DeBrine stopped the car and said, "Bob, if you tell us the truth we can help you. We are the men who can help you." He said, "Well, Mr. DeBrine, I didn't do it. What do you want me to do, say I done it." DeBrine said, "We know you done it, but we want you to tell it from your mouth." So with that, he said, "Yes, I did it. I did. I done it whatever you asked me. Yes I killed Mrs. Kennedy" (R. 457). They got back to headquarters about six and he was given a bottle of medicine which he had to drink in front of Captain Fitzsimmons. DeBrine gave him a pill at seven, another at eight and one at ten. Then a doctor bandaged him up. About ten-thirty Fitzsimmons gave him another pill (R. 458, 459). Then he was taken to the second floor where he saw a lady who operated a typewriter, the doctor and seven or eight detectives, including Fitzsimmons, DeBrine and the District Attorney. He couldn't hold his eyes open, was yawning and fell asleep in the corner. They started to question him (R. 460). He went to sleep and they shook him and woke him up. He never felt like that before. He denied attacking the lady, claiming he didn't go in any house; said he didn't know anything about the crime or who was in the house, or how many rooms there were. He said he never went near Mrs. Kennedy. DeBrine then said, "Let's take him back to Buffalo and then we will get him

worked over" (R. 460-462). The District Attorney continued to question him until he finally told him he would tell him anything he wanted to hear. However, when he was asked how he killed Mrs. Kennedy he said he didn't know, and when asked if he threw the victim on the floor he denied it. He continued to deny the whole crime. When asked by the District Attorney what was wrong with him, he said he was sleepy. Finally he couldn't answer half the questions so they let him go to sleep (R. 463-465). After twenty or thirty minutes DeBrine woke him up and the District Attorney questioned some more. He continued to deny any knowledge of the crime and went to sleep (R. 466-468). The District Attorney woke him up and asked him to sign some papers. He signed one and the District Attorney kept slipping papers in front of him. When he asked how many there were, the District Attorney said it wasn't anything to hurt him. He signed six papers but didn't read them (R. 468, 469). While the signatures on Ex. 46 dated August 18th, and Ex. 47 dated August 19th, were both his, he only signed on one occasion, and that was the stack of six papers on the night of the 18th at No. 2 Station (R. 474, 475). On Sunday morning, the second day after he had signed the statement, DeBrine told him they were going to take him out to Pineacres among the people from Georgia and Alabama, and Fitzsimmons showed him a gun which he said was the kind they had out there. DeBrine said, "Take the black bastard out there and turn him loose." He continued to deny his guilt. They took him out to Pineacres, and when they arrived DeBrine pulled a gun on him and told him, "We want no more lying here, we want the truth" (R. 480). He continued to deny any knowledge of the crime, and after making him put his palm print on the window sill, the District Attorney said, "We ought to kick him out the window" (R. 480). After he was taken

back to headquarters, he was taken before the Police Judge, and the Police Judge told him his trial would be set for September 18th (R. 488). The Judge had him sign a paper but didn't ask him any questions (R. 488).

The above resumè of the petitioner's testimony is given in detail because no words of description could adequately suffice to bring out all of its significance and implications. Either it could be taken as proof of a complete lack of ethics and morals and any sense of common human decency and honor on the part of numerous police officers, the District Attorney of Niagara County, and a foremost medical practitioner in the City of Niagara Falls, or it could be taken as a true reflection of the workings and machinations of a mind completely corrupt and steeped in moral depravity and degeneracy. Without attempting to point out its obvious contradictions and improvisations, the story was in direct conflict with the testimony, direct and rebuttal, of the officers in charge of the investigation, who were with the petitioner on all occasions referred to in his testimony, and was also in direct conflict with the testimony of Dr. Patchin, who was present during the entire time the petitioner was questioned at No. 2 Station when he made his first confession.

It is also significant that petitioner's testimony that he steadfastly maintained his innocence and refused to admit any knowledge of the crime or guilt to the District Attorney when his statement (Ex. 46) was taken down at No. 2 Station on the evening of August 18th but merely signed the statement because of his dazed condition is at odds with petitioner's counsel's contention that petitioner admitted the crime but did so because of fear induced by threats.

All the many factual issues relative to the voluntary character of the admissions and confessions were properly referred to the Jury by the Court, under a full and complete

charge as to the law to which no exceptions were taken by defendant's counsel. Was an unprovoked and brutal assault committed on the petitioner by police officers in Buffalo, followed by acts of sexual depravity? Was the petitioner later subjected to repeated threats and acts of violence by police officers and the District Attorney during the time that he was being questioned in the City of Niagara Falls, was he drugged and while in a state of mental stupor tricked into signing the two confessions, the contents of which were unknown to him, or were the confessions freely and voluntarily made, not induced by threats or fear or stipulations of immunity?

There is nothing in the record in connection with the testimony of the People's witnesses to substantiate petitioner's contention that the admissions and confession should have been as a matter of law held not voluntary. So far as the blow struck the defendant in Buffalo is concerned, it would reasonably appear from the testimony of the People's witnesses that Chief of Detectives Golumbeck acted properly in coming to the aid of a fellow officer under all the circumstances testified to, The point of major significance in our inquiry here moreover is the relationship of the incident to the later admissions and confessions received in evidence. It appeared that further questioning at Buffalo following the incident and the confronting of the petitioner with the identical features of the shorts he was wearing and the shorts picked up at the scene of the crime, brought no change in his denials of guilt (R. 262-265, 337, 338), and his subsequent admissions in Niagara Falls were unaccompanied by any threats and were never retracted during the time he was in custody and questioned by the District Attorney and others (R. 535-540). It would appear that the petitioner's first oral admissions made to the officers were prompted by

his dread realization that his guilt of the horrible crime was known to the authorities by reason of print and clothing identification, and that his repeated lies would not avail him in his defense any more than did the lies of the other murderer referred to on the bridge by the police officers. The whole question of the possible effect on the petitioner of the episode in the lie detector room presented a question which was fairly and properly referred to the Jury with the specific admonition of the Court that,

> "If the circumstances were such that it inspired a fear in defendant's mind so that his confessions in Niagara Falls were not voluntary then such confessions must be disregarded." (R. 625.)

Dr. Patchin testified to examining the petitioner at about 8:15 P. M., on the evening of August 18th at No. 2 Station, just after his return from Buffalo and just prior to his making his first written confession. He told of bandaging the petitioner's ribs with adhesive tape, and that the only evidence of injury, other than the defendant's own statement that his side hurt, was a mouse over the left eye (R. 362). The doctor testified that no pills were given the petitioner until after he had seen him the next afternoon, when the petitioner still complained of pain. He said he then ordered some empirin tablets and citrate of magnesia for him. He had the petitioner X-rayed on Sunday. The prints showed no bone pathology (R. 355), and he removed the tape Monday morning. He testified that the edema or swelling on the petitioner's side was caused by the ingredients of the adhesive tape (R. 527).

The petitioner's counsel asserts that the delay in arraigning the petitioner from five o'clock August 17th to four o'clock August 20th, renders the admissions and confession of the petitioner made during that time incompetent.

He also complains that the petitioner was arraigned on the 20th, which was a Sunday, rather than presumably the following day, which was a regular Court day.

The law of the State in its application of the provisions of Section 165 of the Code of Criminal Procedure to the admissibility of confessions, has been clearly set forth in a number of leading cases. As stated in the opinion of Judge Pound in People vs. Trybus, 219 N. Y. 18 and quoted with approval by Judge Lehman in People vs. Alex, 265 N. Y. 192:

> "* * * In determining whether a confession has been obtained as a result of a beating or is voluntary, the circumstance that it was obtained while arraignment was illegally delayed, for no apparent reason except that the police needed a confession in order to have competent proof of the commission of a crime, should be considered by the Jury."

and in People vs. Mummiani, 258 N. Y. 394,

> "Disregard of the duty of arraignment does not avail however without more to invalidate an intermediate confession. It is only a circumstance to be weighed with others in determining whether a confession has testimonial value."

The Trial Judge properly charged the Jury as to the effect of the delay in arraignment after quoting the provisions of Section 165 Code of Criminal Procedure, stating that:

> "It is a circumstance and a definite element to be taken into consideration by you in determining whether or not the admissions and confessions were voluntary and freely made without being under the influence of fear."

The zeal of our State Courts and the Federal Courts as well, in their somewhat narrower field of scrutiny in carefully reviewing evidence of coercive tactics on the part

of law enforcement agencies in order to protect the constitutional rights of defendants and to eliminate involuntary confessions has been repeatedly demonstrated and the principles of law affecting the admission of confessions, well settled. The application of the law to each particular case, however, must necessarily depend upon the facts peculiar to that case and respondent submits that the facts of the case at bar clearly distinguishes it from Malinski vs. New York, 324 U. S. 401 and the other decisions of this court cited by petitioner in his brief in support of his contention that petitioner's admissions and confessions were coerced. The records afford no basis for a finding of denial of due process as it is so well defined in Lisinba vs. California, 314 U. S. 219, 236,

> "As applied to a criminal trial denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."

In the case at bar the reasonableness and effect of the delay in arraignment and the conduct of the police generally were no doubt considered by the jury in the light of all the circumstances attending the confessions taken while the defendant was in custody. The petitioner's first admissions made within twenty-four hours of his being taken into custody, obviously represented to the police but a partial admission of the whole truth. At no time was the petitioner subjected to continual questioning over long periods of time involving interruptions of normal hours of sleep or regular meals. The morning after the first confession, he was questioned about and admitted the other entries on the project and that the shorts found at the scene of the crime were his. That afternoon he was questioned concern-

ing a murder similar in detail and location to the Kennedy murder, and which he denied. The following day he was taken to the scene of the crime in an effort to satisfy doubts as to some of the details narrated, and immediately thereafter arraigned. That he was arraigned on the 20th, a Sunday, rather than the following day simply reflects the attitude on the part of the authorities that there should be no unnecessary delay. The Jury, on the question of coercive tactics by the police to secure a confession, no doubt considered the fact that the petitioner's wife came to see him on the second night he was in custody and talked with him in his cell, that he was taken out to see her at his request the following afternoon, both visits being prior to his signing the second confession, and subsequent to his being taken to the lie detector, that she and no one else were ever denied admittance to see him prior to arraignment, that Dr. Patchin, having no connection with the Police Department, saw him twice during the same time and was present when the first confession was made, that he was taken out to eat in public restaurants, and that on the day after the first confession and before arraignment, newspaper photographers were allowed to see him and take his picture (R. 304, 305). Certainly on the basis of the believable evidence, there is nothing in the conduct of the police that would indicate any attempt on their part to conceal him from view or to deny him conversation with others, and the People submit that the attitude and conduct of the authorities throughout was fair and reasonable and proper in the light of all the surrounding circumstances in the case, and offered no grounds for vitiating the confession.

Also the fact that arraignment was not had until the third day after the petitioner was taken into custody should not reasonably affect retroactively the voluntary character of statements, oral and written, taken the first day after petitioner was taken into custody.

On all the phases of sharply conflicting evidence in the case as to the voluntary character of the confessions, issues of fact were raised which were left to the jury, in a fair, full and complete charge by the Trial Court as to the law to which no exceptions were taken by petitioner's counsel. The practice of the Trial Court in receiving the evidence and in submitting it to the jury was in accord with the well established law of this state as reviewed by the Court of Appeals in People vs. Doran, 246 N. Y. 419 and consistently followed since.

In the conduct of the prosecution, every effort was made to avoid appeals to sympathy, emotion or prejudice which might improperly influence the fair and impartial determination of the issues by the Jury. Conceding that a case as brutal and shocking to the senses as the case at bar requires extra care and caution on the part of the prosecution and on the part of the court to assure a fair and just trial, it is submitted by the respondent that the petitioner's rights were properly and adequately safeguarded, that he received a fair trial, that the verdict of the Jury was amply supported by the overwhelming evidence in the case and that there were no errors on the trial which would affect his Constitutional rights.

Point III.

The petition should be denied.

Respectfully submitted,

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